No. 83-1455

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 28.1

None of the respondents have any parent corporations, subsidiaries that are not wholly-owned, or affiliates.

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INTRODUCTION

Plaintiffs have petitioned for certiorari from an interlocutory decision which is not ripe for review by this Court. Specifically, they have asked this Court to consider a Seventh Circuit decision which reversed a judgment

against them and remanded the case for a new trial in the District Court. Petitioners will thus have a second opportunity to present their case to a jury. If unsuccessful on remand, they can come before this Court at the appropriate time. If successful on remand, the issues raised by this petition will have become moot. Thus, now is not the time for Supreme Court consideration of this case—at least absent the most compelling reasons for granting the writ. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967); *American Construction Co.* v. *Jacksonville T. & R.R. Co.*, 148 U.S. 372, 384 (1893).

Petitioners present no reason to grant certiorari at this time. Their first two questions, dealing with the Rule of Reason, raise issues that were decided favorably to them, that may be mooted on remand, and that can be resolved, if necessary, after retrial. Their third question, dealing with the *per se* rule, involves application of well-settled legal principles to the specific facts of this case. Similarly, their fourth question, dealing with the *Noerr-Pennington* doctrine, depends entirely on the facts and raises no significant legal issues. In short, none of the issues presented even approaches the importance required for this Court to grant certiorari at this interlocutory stage.

STATEMENT OF THE CASE

This case involves an antitrust challenge to an ethical guideline issued by the American Medical Association and allegedly implemented by the AMA, seven other medical and health care organizations, and four individual officials ("respondents"). The guideline in question provided that "[a] physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate professionally with anyone who violates this principle."

See Pet. App. 6, 8. This guideline constituted Principle 3 of the AMA's Principles of Medical Ethics (1957 ed.).

Petitioners are five individual chiropractors ("petitioners"). They brought this action in October of 1976 alleging that Principle 3 and respondents' so-called "implementing conduct" had prevented physicians from referring patients to chiropractors, from accepting referrals from chiropractors, and from providing services to chiropractors—all in violation of §§ 1 and 2 of the Sherman Act.[1] They further alleged that certain respondents had violated the antitrust laws by contending in public forums that chiropractic is unscientific and quackery.

The case went to trial in December of 1980 and lasted eight weeks. Petitioners presented facts showing that chiropractic is a method of treating disease through adjustment of the spine. They endeavored to prove that chiropractors seek to serve certain patients who are treated by physicians. Finally, they sought to adduce facts purporting to show that respondents had implemented Principle 3 so as to reduce the ability of chiropractors to compete for these patients.

In turn, respondents introduced evidence explaining the history of and reasons for the challenged conduct and showing its procompetitive effects in the market for physicians' services.[2] They demonstrated why they believed that

[1] This response addresses factual issues without differentiation among the specific positions of the various respondents. Each respondent nonetheless maintains its individual position with respect to the factual characterization of its conduct and the absence of evidence linking it to any alleged conspiracy.

[2] Both petitioners' and respondents' expert witnesses testified that there was no cross-elasticity of demand between medical doctors and chiropractors. Respondents' economist, Dr. Keith Leffler, testified that respondents' conduct had procompetitive effects. Petitioners offered no contrary expert testimony.

lack of scientific training in the diagnosis and treatment of disease often made chiropractors dangerous to patients whom they purported to serve. Further, they showed the widespread nature of the unscientific practices of chiropractors. In short, respondents offered abundant evidence establishing the reasonableness of their belief that for physicians "to collaborate with chiropractors in the care of persons who are patients of the medical doctors is to compromise the application of scientific principles, to violate the oaths taken by the medical doctors, and to introduce risk to the health and lives of the patients for whom the medical doctors have accepted responsibility." Pet. App. 33.

The District Court instructed the jury that the challenged conduct would be unlawful *per se* if the jury found it to have been undertaken "for the specific purpose of excluding chiropractors from the market or injuring them in their ability to compete." *See* Pet. App. 20. Absent such a finding, the jury was to determine whether the conduct "imposed an unreasonable restraint of trade." *Id.* In making this assessment, the jury was to consider several factors. *Id.* at 25-27. The first of these was the effect of the challenged ethical guideline on "competition, if any, that exists between chiropractors generally and medical doctors." *Id.* at 25. In addition, the jury was to consider the effect of the guideline on competition among physicians. Thus, the instructions noted that ethical standards can help "to insure that the profession merits the trust that the public necessarily places in its members" and can give physicians "guidance as to generally accepted standards of conduct in their profession." *Id.* at 26. Finally, the jury was to take into account such matters as "the justification advanced in support of the standard." *Id.* at 29.

The jury returned a verdict for all respondents. It rejected application of the *per se* rule. Further, it found that the challenged conduct satisfied the Rule of Reason.[3]

The Seventh Circuit reversed. It held that the jury instructions had misstated the Rule of Reason. Preliminarily, however, it considered the propriety of a *per se* instruction. Its analysis of the evidence, viewed most favorably to petitioners, led it to reject the assumption "that facts could have been distilled by the jury from this record which would constitute a *per se* violation." Pet. App. 23. Rather, it held that "the nature and extent" of the challenged conduct were "too uncertain to be amenable to *per se* treatment." Therefore, a *per se* instruction was deemed inappropriate. *Id.*

With respect to the Rule of Reason, the Seventh Circuit held that proof by petitioners of an adverse effect on competition would place the burden on respondents to show that the "dominant motivating factor" behind their conduct was an "objectively reasonable" concern for "what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship." Pet. App. 34. In addition, it required respondents to demonstrate that the challenged conduct was the least restrictive alternative available to them. *Id.* The Court concluded that respondents would bear a "heavy burden" in justifying their conduct. *Id.* at 34-35.

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[3] There was abundant evidence from which the jury could find that the overall effect of the challenged guideline was to *promote* competition by raising medical standards, preserving scientific methods of diagnosis and treatment, and promoting public trust in the medical profession. All of these facilitate consumer comparisons among physicians on the basis of quality, price, availability, and other factors. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* 171-91, 275-82 (1977).

The Court also considered whether the First Amendment protected respondents' conduct intended to influence legislative and administrative bodies. In essence, the District Court had instructed that such conduct was lawful if respondents were found to have undertaken it "with a sincere purpose to obtain the governmental actions that they sought." Pet. App. 39. The Court of Appeals held that this instruction correctly reflected controlling decisions of this Court. *Id.* at 39-40.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. The Seventh Circuit Correctly Held That The *Per Se* Rule Has No Application To This Case

Petitioners contend that the Seventh Circuit erred in rejecting a *per se* instruction. This entire argument is based on petitioners' wooden application of the "group boycott" label to the unique facts of this case and the citation of cases which hold that certain group boycotts are illegal *per se*. This argument can be made only by ignoring the facts and distorting the law.[4]

Initially, the Court of Appeals reviewed the evidence and rejected the assumption "that facts could have been distilled by the jury from this record which would constitute a *per se* violation." Pet. App. 23. As the Court pointed out, this is not a case in which physicians are alleged to have entered into an illegal agreement and "have agreed to ostracize or boycott those among them who fail to go along" with their wishes. *Id.* at 17. It is not a case in which

[4] Even petitioners admit that not all "boycotts" are illegal *per se*. Pet. at 23. In essence then, they are simply asking this Court to reexamine the factual context of this case to determine whether the Court of Appeals was correct in its determination that the specific facts of record do not warrant invocation of the *per se* rule. This factual question does not support a grant of certiorari.

physicians "are alleged to have combined to boycott chiropractors in an attempt to coerce the chiropractors to behave in a certain economic manner." *Id.* Indeed, it clearly involved no "compulsion upon anyone to do or to refrain from doing anything else." *Id.* at 23.

As the Court recognized, conduct of this nature should not be condemned without analysis of its competitive significance. In the words of the Court, "a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment." Pet. App. 24. Nothing in any precedent of this Court even remotely suggests a contrary conclusion.

The Rule of Reason is the basic mode of antitrust analysis. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). The *per se* rule applies only to those practices which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . ." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). It should not be invoked by the uncritical affixation of labels. *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8-10 (1979). Instead, a *per se* approach should be taken only after "considerable experience with certain business relationships" conclusively demonstrates that they lack any procompetitive justification. *Id.*, quoting *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Surely, that considerable experience is lacking with respect to the unique set of facts presented here.

This Court has been particularly careful to avoid use of the "group boycott" label to condemn, without further analysis, conduct which may have procompetitive consequences. Thus, the classic formulation of the Rule of Reason is found in a case involving a "group boycott"—as petitioner would use that phrase. Specifically, in *Chicago*

Board of Trade v. *United States*, 246 U.S. 231 (1918), the conduct at issue amounted to a "group boycott" of night traders by exchange members. The Court explicitly rejected the proposition that this conduct could be condemned without a thorough analysis of its competitive significance. *Id.* at 238. The same approach applies equally here.[8]

In fact, invocation of the *per se* rule is particularly inappropriate here since this case arises in the context of an ethical norm of the medical profession. As this Court counseled in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975):

> "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."

In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978), the Court adhered to this position and noted that ethical norms may "regulate and promote" competition and "thus fall within the Rule of Reason." Recently, in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court suggested that a *per se* analysis is improper for agreements that are "prem-

[8] The Supreme Court cases cited by petitioners, Pet. at 22, all dealt with conduct which had no procompetitive justifications or which involved attempts to coerce the plaintiffs to behave in a certain economic manner. Thus, they are readily distinguishable from this case.

ised on public service or ethical norms" or that are alleged to enhance "the quality of the professional service." *Id.* at 349. That is precisely the sort of agreement at issue here. Application of the *per se* rule would only prevent the courts from conducting the analyses appropriate to the professional ethical context of this case.[8]

In short, petitioners' request for a *per se* rule by incantation of the words "group boycott" is nothing more than an effort to exalt semantics over substance. It does violence to the facts of this case and to the decisions of this Court. It affords no basis for the granting of certiorari.

II. The Seventh Circuit Did Not Create An Impermissible Defense Under The Rule of Reason

Petitioners contend that the Seventh Circuit erred by allowing respondents to present a "public health and safety" defense not recognized by the Rule of Reason as set forth in such cases as *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). This contention misreads the decision of the Court of Appeals. On the contrary, the Seventh Circuit explicitly noted that:

> "[A] generalized concern for the health, safety and welfare of the members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with some medical doctors by chiropractors." Pet. App. 37.

[8] As the Court of Appeals put it, "[p]articularly when a conspiracy of this sort is alleged in the context of a profession, the nature and extent of its anticompetitive effect are too uncertain to be amenable to *per se* treatment. . . ." Pet. App. 23.

The Court emphasized that it is "important that the jury understand that a generalized public interest motive affords no legal excuse for such economic warfare." *Id.* at 36.

What the Seventh Circuit did was to require respondents to show:

> "(1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; [and] (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it." *Id.* at 34.[7]

Contrary to petitioners' position, these factors are not irrelevant to the traditional Rule of Reason. As Justice Brandeis pointed out in *Chicago Board of Trade, supra,* 246 U.S. at 238, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Or, as this Court put it in *Professional Engineers, supra,* 435 U.S. at 692, the Rule of Reason requires analysis of "the facts peculiar to the business, the history of the restraint, and the reason why it was imposed" so that the trier of fact can "form a judgment about the competitive significance of the restraint." The three factors quoted above are all incorporated within these formulations of the Rule.

Thus, petitioners are wrong in claiming that a consideration of the justifications for respondents' conduct constitutes an unprecedented expansion of the Rule of Reason.

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[7] The Court also required respondents to show that their "concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition." Pet. App. 34-35. This modification of the Rule of Reason is unduly favorable to petitioners. *See* Cross-Petition.

See E. Pollock, "The Seventh Circuit and the Rule of Reason," 22 Ill. State Bar Ass'n Antitrust Law J., Vol. I (1983). The inquiry under the Rule of Reason is not restricted, as petitioners would like, to whether respondents' conduct impaired competition between chiropractors and physicians. *See Chicago Board of Trade, supra,* 246 U.S. at 238 ("the legality of an agreement . . . cannot be determined by so simple a test, as whether it restrains competition"). On the contrary, before the overall competitive significance of challenged conduct can be evaluated, an assessment must be made not only of its effect on competition between plaintiffs and defendants, but also of the reasons and procompetitive justifications for it. *Id.* at 238; *Professional Engineers, supra,* 435 U.S. at 692. To that assessment, the history, purposes and nature of the challenged conduct are all relevant factors.

The decision of the Seventh Circuit allows the trier of fact on remand to take these matters into account in forming a judgment about the overall competitive significance of the challenged conduct. It permits the jury to consider whether, considering all factors, such conduct "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade, supra,* 246 U.S. at 238; *Professional Engineers, supra,* 435 U.S. at 691. It does not create a "health, safety and welfare defense."

In sum, the decision of the Seventh Circuit neither modifies the Rule of Reason adversely to petitioners nor allows consideration of values unrelated to competition. The real modification of the Rule of Reason made by that decision was to place upon respondents the burden of persuasion on some factors bearing on competitive significance. *See* Cross-Petition. Petitioners, however, have no cause to complain about this. Accordingly, their petition should be denied.

III. The Seventh Circuit's Treatment of the *Noerr-Pennington* Issue Was Proper

Petitioners object to the Seventh Circuit's affirmance of the District Court's instruction regarding the *Noerr-Pennington* doctrine. Pet. at 27-30. This instruction stated that respondents' advocacy of positions before legislative and administrative bodies was lawful if "the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought." Pet. App. 39. This instruction correctly states the *Noerr-Pennington* doctrine, and the Seventh Circuit properly affirmed it.

Petitioners contend, however, that this instruction prohibited the jury from taking into account evidence relating to the AMA's purported role in an HEW study regarding chiropractic. The question of what role the AMA played in the HEW study is purely factual. The question presented by petitioners involves no more than the application of well-settled legal principles to those facts. It offers no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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